

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DEBORAH H. KIRK	:	DETERMINATION
	:	DTA NO. 818967
for Redetermination of a Deficiency or for Refund of	:	
New York City Personal Income Tax under the New	:	
York City Administrative Code for the Year 1993.	:	

Petitioner, Deborah H. Kirk, 200 East 62nd Street, Apt. 5B, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the New York City Administrative Code for the year 1993.

On July 24, 2002, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel), filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days of the issuance of the notice of deficiency. Petitioner, appearing by Kostelanetz & Fink, LLP (Kevin M. Flynn, Esq., of counsel), filed a response to the motion on August 30, 2002, which commenced the 90-day period for issuance of this determination. Based upon the motion papers and the affidavits and documents submitted therewith, the response by petitioner and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to Deborah H. Kirk (“petitioner”) a Notice of Deficiency dated May 12, 1997 which was addressed to petitioner at “200 E 62 St 5B, New York, NY 10021-8209.” The notice bears assessment identification number L-013507861-5 and certified control number P 911 204 494. The Notice of Deficiency asserted a deficiency of New York City personal income tax in the amount of \$23,739.00, plus penalty and interest, for a total amount due of \$36,922.84 for the year 1993.

2. On December 20, 2001, the Division issued a Collection Notice and a Consolidated Statement of Tax Liabilities to petitioner which stated that her liability for 1993 (Assessment ID No. L-013507861-5) was subject to collection action and the accrual of additional penalty and interest. This liability was in the amount of \$23,739.00, plus penalty and interest, for a total balance due of \$59,766.49. The Consolidated Statement of Tax Liabilities also advised petitioner that interest and penalty totaling \$318.71 for the year 1999 had also been determined to be due, although not yet subject to collection action.

3. On January 7, 2002, petitioner sent a Request for Conciliation Conference for the tax year 1993 which was received by the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) on January 8, 2002. A rider to the Request for Conciliation Conference stated that on November 13, 2001, petitioner filed a Request for Conciliation Conference with BCMS for

the tax years 1994, 1995 and 1996. By a letter dated November 23, 2001, BCMS acknowledged receipt of petitioner's request for a conciliation conference for the year 1994 (Notice No. L020151435); by letter dated November 26, 2001, BCMS acknowledged receipt of a request for a conciliation conference for the years 1995 and 1996 (Notice No. L020151438). In the rider, petitioner asserts that since the issue for the years 1994, 1995 and 1996 is identical to the issue for the year 1993, i.e., whether petitioner is liable for New York City personal income tax as an alleged resident of New York City, BCMS should take jurisdiction of the case for 1993 and should schedule a conciliation conference for 1993 together with the years 1994, 1995 and 1996.

4. On January 25, 2002, BCMS issued a Conciliation Order Dismissing Request (CMS No. 190185) for the tax year 1993 (Notice Number L013507861) which stated as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on May 12, 1997, but the request was not mailed until January 7, 2002, or in excess of 90 days, the request is late filed.

The request for a Conciliation Conference is denied.

5. On April 10, 2002, the Division of Tax Appeals received a petition from petitioner, Deborah H. Kirk, dated April 9, 2002, which was filed seeking administrative review of the Conciliation Order Dismissing Request dated January 25, 2002. The petition alleged that since the issues in the cases for 1994, 1995 and 1996 are identical to the issue in the 1993 matter, BCMS should take jurisdiction of petitioner's case for 1993 and schedule a conciliation conference for that year along with the years 1994, 1995 and 1996 or, in the alternative, petitioner's matter for 1993 should be set down for a hearing by the Division of Tax Appeals.

6. In support of its motion for summary determination, the Division submitted an affidavit of its representative, Jennifer L. Hink, Esq.; its answer to the petition; the affidavits of Colleen Hunter, Geraldine Mahon and Daniel LaFar, employees of the Division; a copy of the Division's

certified mail record for May 12, 1997; a copy of the Notice of Deficiency issued to petitioner; copies of petitioner's 1995 and 1996 personal income tax returns (forms IT-201) along with a copy of petitioner's 1996 Application for Additional Extension of Time to File for Individuals; a copy of the petition dated April 9, 2002; a copy of the envelope which was used to mail petitioner's Request for Conciliation Conference; the Request for Conciliation Conference and a copy of the Conciliation Order Dismissing Request.

7. In May 1997, Colleen Hunter was employed as a keyboard specialist in the Division's Audit Division/Income Tax Unit. As part of her duties, she was fully familiar with the operations and procedures of the Audit Division, including the mailing of notices of deficiency, which were in effect on May 17, 1997.

Notices of deficiency mailed within the United States are sent by certified mail. In May 1997, it was the practice of the Audit Division that certain notices were pulled for manual review and a clerk in the control unit would manually prepare the certified mail record (hereinafter "CMR") in certain circumstances. Notices were pulled for review in order to verify a taxpayer's mailing address. The notices were sent to the Audit Division from the Division's Case and Resource Tracking System ("CARTS") Control Unit. When a notice was pulled for manual review, it was necessary to prepare a CMR, which was a listing of taxpayers to whom notices of deficiency were sent by certified mail on a particular day. After review, a clerk would complete the CMR. A certified control number was assigned to the notice listed on the CMR. The clerk then placed the notice in an envelope where the certified control number and the taxpayer's name and address were revealed through the windowed envelope. In the present matter, certified number P 911 204 494 was assigned to the notice mailed to petitioner. A copy of the CMR was

kept by the Audit Division in the regular course of business. The Notice of Deficiency and the CMR were then delivered by the Income Tax Unit to the Division's Mail Processing Center.

Each page of a CMR is a separate and individual CMR for the notices listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender," the "Total Number of Pieces Received at Post Office," and "Postmaster, Per (Name of Receiving Employee)" for notices listed on just that page. The CMR for the Notice of Deficiency mailed on May 12, 1997 consisted of one page. The Notice of Deficiency mailed to petitioner was the only listing on this CMR.

In the upper left hand section of the CMR is the stamped/typed notation:

STATE OF N.Y. CARTS
DEPT. OF TAXATION AND FINANCE
ALBANY, NY 12227

In the middle of the CMR, a United States Postal Service ("USPS") employee affixed a U.S. postmark of May 12, 1997, wrote in the number of pieces received ("1") and initialed the CMR.

The Division's Mail Processing Center returned a copy of the CMR to the CARTS Control Unit with a postmark affixed to show the date of mailing. The CMR is kept as a permanent record.

The procedures followed and described in Ms. Hunter's affidavit were the normal and regular procedures of the Audit Division on May 12, 1997. Ms. Hunter reviewed a copy of the Notice of Deficiency issued to petitioner and that notice bore the assessment identification number "L-013507861" and the certified control number "P 911 204 494" which numbers are identical to the assessment identification and certified control numbers which appear next to the entry for "KIRK-DEBORAH, A" on the CMR.

8. Geraldine Mahon is the Principal Clerk of the CARTS Control Unit of the Division. As part of her duties, Ms. Mahon supervises the processing of notices of deficiency and notices of determination (“statutory notices”) generated by CARTS. The computer-generated statutory notices are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control numbers are recorded on the CMR under the heading “CERTIFIED NO.” In some cases, notices are pulled for manual review. Based upon her review of the affidavit of Colleen Hunter and the exhibits attached thereto, Ms. Mahon was able to determine that the Notice of Deficiency for petitioner was pulled and was sent to the Audit Division/Income Tax Unit for review and preparation of the CMR. The CMR was then returned to the CARTS Control Unit with a postmark affixed to show the date of mailing.

9. Daniel LaFar is a Principal Mail and Supply Clerk with the Division’s Mail Processing Center. As a Principal Mail and Supply Clerk, Mr. LaFar is fully familiar with operations of the Mail Processing Center. His duties include the supervision of the staff which delivers outgoing mail to branch offices of the United States Postal Service.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of Mr. LaFar’s staff operates a machine that puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelope. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

Once the review of the CMR and envelopes is completed, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the branches of the USPS located in the Albany, New York area. A USPS employee then affixes a postmark and/or his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. As standard procedure, to insure accountability, the CMR may be left overnight at the post office to enable the postal employee to have sufficient time to process the certified mail and to make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of Mr. LaFar's staff and it is then delivered to the CARTS Control Unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed on the CMR.

Mr. LaFar's review of the CMR listing the pieces of certified mail delivered to the USPS by the Mail Processing Center staff on May 12, 1997 confirms that a USPS employee initialed the CMR, affixed a postmark and wrote in the total number of pieces of certified mail received. The CMR indicates that a total of one piece of mail listed was delivered to the USPS on May 12, 1997. Based upon his review of the affidavits of Colleen Hunter and Geraldine Mahon and the exhibits attached to these affidavits along with his personal knowledge of the procedures of the Mail Processing Center, Mr. La Far attested to the fact that on May 12, 1997, an employee of the Mail Processing Center delivered one piece of certified mail addressed to "KIRK-DEBORAH, H., 200 E.62 ST. 5B, NEW YORK, NY 10021-8209" to the USPS in Albany, New York in a sealed postpaid windowed envelope for delivery by certified mail. Mr. LaFar further attested to the fact that a member of his staff obtained a copy of the CMR delivered to and accepted by the

USPS on May 12, 1997 to be kept as part of the records of the Division's CARTS Control Unit. The procedures concerning the mailing of a piece of certified mail as set forth in Mr. LaFar's affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business and these procedures were followed in mailing the piece of certified mail to petitioner on May 12, 1997.

10. Petitioner's 1995 and 1996 New York State personal income returns (forms IT-201) and an Application for Additional Extension of Time to File for Individuals, dated August 6, 1997, indicate that petitioner's address is 200 East 62nd St., New York, NY 10021.

11. Petitioner's response to the Division's motion for summary determination, received by the Division of Tax Appeals on August 30, 2002, states, in part, as follows:

Petitioner, after reviewing the affidavits and exhibits annexed to the Division of Taxation's (the "Division") Motion for Summary Determination (the "Motion"), hereby states that she has no objection to the Motion.

In her response, petitioner also claims that she was not a resident of New York City for the year 1993.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." Petitioner does not contend that the Notice of Deficiency

was sent to an incorrect address nor does she object to the Division's motion for summary determination. The evidence in this record shows that the address listed on the Notice of Deficiency was the address which was provided by petitioner on the tax returns filed for the years 1995 and 1996 as well as on an Application for Additional Extension of Time to File for Individuals filed in August 1997, which was three months after the issuance of the Notice of Deficiency (May 12, 1997).

C. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency or, in the alternative, may file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days of the mailing of the Notice of Deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 2, 1996).

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of the three Division employees, Colleen Hunter (a keyboard specialist in the Audit Division/Income Tax Unit), Geraldine Mahon (Principal Clerk

of the CARTS Control Unit) and Daniel LaFar (Principal Mail and Supply Clerk) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of deficiency. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the Notice of Deficiency and the certified mail record submitted by the Division as evidence of actual mailing of the notice to petitioners. The documents and affidavits also establish that the general mailing procedures described by Ms. Hunter, Ms. Mahon and Mr. La Far were followed with respect to the notice at issue in this matter.

Petitioner's name and address appear on the CMR which bears a USPS postmark of May 12, 1997. There is only one certified control number listed on the CMR. There were no deletions on the CMR. Therefore, the total number of items for mailing was "1" and the USPS employee who initialed the CMR on the bottom thereof indicated that he or she received "1" item for mailing. The Notice of Deficiency contained the same certified control number (P 911 204 494) as was set forth on the CMR. The Division has, therefore, established that it mailed the Notice of Deficiency to petitioner, by certified mail, on May 12, 1997. The Request for Conciliation Conference was dated January 7, 2002 and was received by BCMS on January 8, 2002, a date which was approximately four years and eight months after the issuance of the Notice of Deficiency. Apparently, the Request for Conciliation Conference was filed in response to the issuance, by the Division, of a Collection Notice and a Consolidated Statement of Tax Liabilities on December 20, 2001. It is clear, therefore, that petitioner's filing of a Request for Conciliation Conference on January 7, 2002 was untimely and BCMS, on January 25, 2002, properly issued a Conciliation Order Dismissing Request. Accordingly, the Division of Tax Appeals is without

jurisdiction in this matter and may not consider the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. The Division of Taxation's motion for summary determination is granted and the petition of Deborah H. Kirk is dismissed.

DATED: Troy, New York
November 14, 2002

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE